

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

DO. No. 75-2065

DOCKET NO. 75-2065

To be argued by:

MICHAEL A. CORRIERO

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

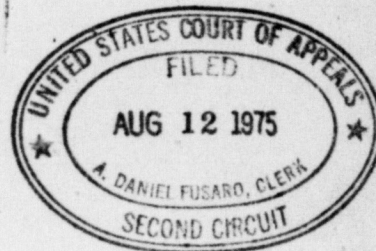
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GUS SCLAFANI,

Petitioner-Appellant,

-against-

H. R. HOGAN, Warden, U.S.
Penitentiary, Atlanta, Georgia,

Respondent-Appellee.
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PETITIONER-APPELLANT'S REPLY BRIEF

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INDEX

Statement.....	1
Reply to Appellee's Argument.....	2
I. Sclafani did not waive his claim by failing to raise it prior to trial.	
Conclusion.....	5

Table of Cases

United States v. Crispino, No. 74 Cr. 932 (S.D.N.Y. Feb. 13, 1975).....	3
United States v. Williams, No. 74 CR-47-W-1 (W.D. Mo. orders of 11/15/74 and 12/3/74).....	4

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STATEMENT

A point has been raised in Appellee's brief
that obliges our reply.

ARGUMENT

POINT ONE: SCLAFANI DID NOT WAIVE HIS CLAIM BY FAILING TO RAISE IT PRIOR TO TRIAL.

Rule 12(b) (2) of the Federal Rules of Criminal Procedure provides two exceptions to its applicability:

1. If the indictment fails to show jurisdiction in the Court;
2. If the indictment fails to charge an offense.

It is the contention of Sclafani that no valid or legal indictment existed against him because of the unlawful appointment of the prosecutor who presented the evidence to the grand jury.

Consequently, if there was no valid indictment, the prosecution must fail, for without a valid indictment, no offense has been charged nor does the Court have jurisdiction of the case.

Moreover, it is the contention of Sclafani that the defect alleged is not in the "institution of the prosecution" which would be waived pursuant to 12(b) (2) but it is rather a defect that goes to the jurisdiction of the Court as well as a violation of Sclafani's constitutional rights.

In United States v. Crispino, No. 74 Cr. 932
(S.D.N.Y. Feb. 13, 1975 and March 24, 1975) (Werker, J.),
the Court stated at P.23,

"...Congress has placed certain limitations and requirements on the appointment of special attorneys, and these conditions have not changed in almost seventy years despite an attempt at amendment of the act. The intent of Congress cannot be changed by the unilateral act of the Attorney General. The importance of requiring a department to adhere to the letter of the enabling legislation is basic to the preservation of the balance between the branches of our Government. Recent events have shown that abuse results when that rule is not observed."

Therefore, Sclafani's contention is that rule 12(b)(2)'s waiver provision is not applicable in this case.

Assuming arguendo that the provision is applicable, Rule 12(b)(2) also provides that the Court "for cause shown may grant relief from the waiver."

In the instant case, failure to raise the instant claim prior to trial was not deliberate nor an intentional relinquishment or abandonment of a known right or privilege.

The subject letter of authorization and its content was until recently, considered "Internal Documents"

of the Department of Justice and not readily available to Sclafani at the time of his indictment.

Nor was the existence of said letter or the circumstances under which it was issued, notorious in the sense that Sclafani can be charged with a knowing waiver or relinquishment of a challenge to the purported authority conferred by the letter.

See United States v. Williams, (Docket No. 74 Cr. 47-W-1 (W.D. Ms orders of 11/15/74 and 12/3/74)).

CONCLUSION

The defect alleged by Sclafani goes to the jurisdiction of the Court and is not merely a defect in the "institution of the prosecution." Nevertheless, even if the waiver provisions of 12(b)(2) apply, good cause has been shown by Sclafani in light of the special circumstances surrounding the case to warrant the Court's consideration of Sclafani's contention.

DATED: New York, New York
August 1, 1975

Respectfully submitted,

CASTRATARO, HERMAN, BEININ & CORRIERO

George J. Castrataro
Of Counsel

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AFFIDAVIT OF SERVICE

Docket No. 75-2065

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

ALBERTA O'NEIL, being duly sworn, deposes and says:

I am not a party to the proceeding; am over the age of 21 years of age and reside at Queens, New York.

That on the *5th* day of August, 1975, I served the within Appellant's Reply Brief upon the following individual at the address designed by said individual for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper to said individual, in an official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

JACOB LAUFER
Special Attorney
United States Department of Justice
26 Federal Plaza
New York, New York 10007

+

Alberta O'Neil

ALBERTA O'NEIL

Sworn to before me this

5th day of August, 1975.

William J. Beinin

WILLIAM J. BEININ
Notary Public, State of New York
No. 41-0226515
Qualified in Queens County
Commission Expires March 30, 1977